**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **KENNETH M. SAFFER** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 1,030,669 |
| **STAR CONSTRUCTION, INC.** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **CONTINENTAL WESTERN INSURANCE COMPANY** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent appeals the December 18, 2006 preliminary hearing Order For Compensation of Administrative Law Judge Brad E. Avery. Claimant was awarded temporary total disability compensation commencing August 13, 2006, until further order, until claimant reaches maximum medical improvement or is released to a regular job or returns to gainful employment, and medical treatment with Dr. Amundson as the authorized health care provider.

## ISSUES

1. Did claimant suffer accidental injury arising out of and in the course of his employment with respondent?

2. If claimant did suffer a work-related accidental injury, did the Administrative Law Judge (ALJ) err in determining claimant suffered a "series" of injuries as opposed to a one-time injury on July 17, 2006?

3. Did the ALJ err in determining that claimant gave timely notice of his alleged injury or injuries?

4. Did the ALJ exceed his jurisdiction in determining claimant is a full-time employee for purposes of calculating claimant's average weekly wage at the time of his alleged injury?

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order For Compensation should be affirmed.

Claimant worked as a laborer in respondent's concrete business. Claimant's duties included pouring concrete, setting forms, finishing concrete and moving equipment. Claimant testified that on July 17, 2006, while helping Jeff Herrick, respondent's owner, move a trowel machine which weighed about 150 to 160 pounds, he felt a pop in his hip. Claimant felt no pain at that time, but by the next morning, he had pain going down his left leg. Claimant testified that he talked to Mr. Herrick about the pop at that time. Mr. Herrick denies having any conversation with claimant about claimant hurting himself or anything about a "pop".

Claimant testified that his back and hip condition grew steadily worse as he continued to perform the heavy labor for respondent. Claimant continued to work for respondent doing his regular work until August 10, 2006. On that date, claimant was in significant pain and advised respondent's foreman, Gary McDaniel, that he was leaving work early and was going to a doctor. August 10 was the last date claimant worked for respondent prior to the preliminary hearing on December 15, 2006.

Mr. Herrick, Mr. McDaniel and Ray Miller, respondent's supervisor, all agreed that clamant had ongoing problems with his hip, and had missed work on occasion, or left early due to ongoing hip pain and a need for medical treatment. All disputed that claimant ever told them the hip pain was work-related, and all testified that claimant never told them of a work-related injury to his back.

Claimant sought medical treatment at the Newman Regional Health emergency room on August 13, 2006. At that time, claimant reported "acute left buttock and left hip area pain now for about 24 hours." Also contained in the records from August 13 was a notation that claimant had helped someone move something very heavy several days ago and had twisted wrong and has had shooting pains ever since.[1] Claimant denies telling the emergency room personnel that he hurt himself 24 hours ago, but agrees he did tell them

[1] P.H. Trans., Cl. Ex. 1.

of moving something heavy several days ago, with several days meaning July 17, 2006.[2] The medical records in this record conflict, with some records noting the alleged injury on July 17 and some stating nothing about a work-related injury.

In workers compensation litigation, it is the claimant's burden to prove his/her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

In this matter, whether claimant suffered an accidental injury arising out of and in the course of his employment depends to a great deal on the credibility of the testimony of claimant and respondent's representatives. The Board, at times, gives deference to an administrative law judge's determination regarding witness credibility, due to the

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[2] P.H. Trans. at 45.

[3] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 2006 Supp. 44-501(a).

[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

administrative law judge's ability to observe those witnesses testify at a hearing. Here, the ALJ apparently found claimant's testimony to be the more credible. This Board Member agrees that claimant has proven, although by the barest of margins, that he suffered accidental injury arising out of and in the course of his employment with respondent.

Claimant's initial E-1, Application For Hearing, filed with the Workers Compensation Division on August 30, 2006, listed an accident date on July 17, 2006. An Amended Application For Hearing was filed on December 8, 2006, alleging a series of accidents beginning on or about July 17, 2006, and continuing through about August 10, 2006. Claimant testified that his back and hip pain worsened up to his last day worked with respondent, at which time claimant was having trouble moving and had to go home early due to the pain. Respondent disputes claimant's contention that he suffered a series of accidents through his last day worked. However, claimant testified that his condition continued to worsen as he continued to perform the heavy labor for respondent.

Respondent's representatives agreed that claimant missed work on occasion due to ongoing hip pain, although the exact dates of those missed work days could not be determined in this record. It is undisputed that claimant left work on August 10, 2006, with significant hip pain, indicating that he was going to seek medical treatment. Additionally, the only medical opinion regarding whether claimant suffered ongoing worsening of his condition while working is that of Lynn A. Curtis, M.D., of Disability Consulting PA in Topeka, Kansas. Dr. Curtis examined claimant at claimant's attorney's request on November 14, 2006. At that time, Dr. Curtis determined that claimant had suffered a lifting injury on July 17, 2006, resulting in a left S1 radiculopathy, a left L5-S1 disc herniation and an L4-5 disc bulge. Dr. Curtis, in his November 14, 2006 letter to claimant's attorney, also noted that claimant's conditions were aggravated with continued working and no medical referral by the employer. This Board Member finds that claimant continued to aggravate his work-related injury through his last day with respondent. Respondent agreed at the preliminary hearing that the notice defense only applied to the July 17, 2006 alleged date of accident. It was agreed that if the claimant suffered an accidental injury through his last day with respondent, then timely notice was provided. The finding by this Board Member that claimant suffered accidental injury through his last day worked thus renders the notice defense moot.

Respondent alleges the ALJ exceeded his jurisdiction in finding claimant was a full-time employee for the purposes of determining an average weekly wage.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[7]

It is within the ALJ's jurisdiction to determine the average weekly wage to be utilized in these matters.

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.[8]

Respondent's appeal of the ALJ's finding regarding claimant's average weekly wage is, therefore, dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp.44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Order For Compensation of Administrative Law Judge Brad E. Avery dated December 18, 2006, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

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[7] K.S.A. 44-534a(a)(2).

[8] *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977); *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).

[9] K.S.A. 44-534a.

Dated this ____ day of March, 2007.

BOARD MEMBER

c: Michael C. Helbert, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge